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No. 1033

# In the Supreme Court of the United States

*October Term, 1945.*

F. A. GILLESPIE, *Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## Petition for Writ of Certiorari, and Brief in Support Thereof

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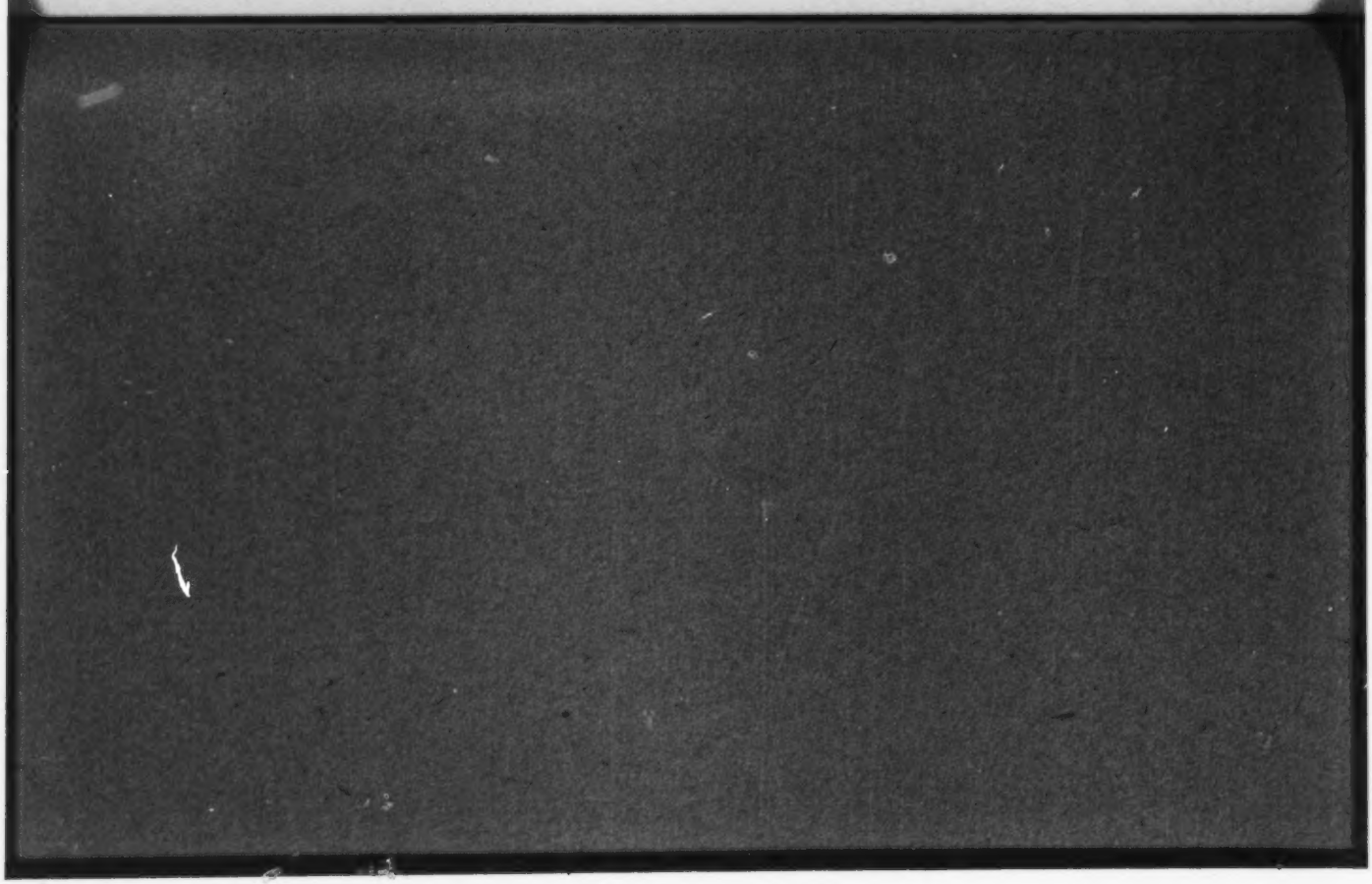

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IN THE SUPREME COURT OF THE UNITED STATES.
*October Term, 1945.*

No. .....

F. A. GILLESPIE, *Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above entitled cause on October 29, 1945, affirming the decisions of the Tax Court of the United States (formerly United States Board of Tax Appeals). Petition for rehearing was filed on December 7, 1945, pursuant to an order entered November 23, 1945, extending the time for filing the petition for rehearing to December 8, 1945. The petition for rehearing was denied on January 2, 1946.

## Opinion Below.

This case was considered by the Tax Court of the United States (formerly United States Board of Tax Appeals) and by the United States Circuit Court of Appeals for the

Tenth Circuit. The opinion of the Board of Tax Appeals was a memorandum opinion and is unreported but appears at record, page 23.

The opinion of the Circuit Court of Appeals is reported in .... Fed. (2d) ...., and appears in the record at page 141; RICE, District Judge, dissented but filed no dissenting opinion.

**Jurisdiction.**

The judgment of the Circuit Court of Appeals was entered on October 29, 1945, and thereafter, pursuant to an order granting an extension to December 8, 1945, a petition for rehearing was filed on December 7, 1945, and was denied on January 2, 1946. (R. 147-162) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, Title 28, United States Code 347.

**Question Presented.**

In this proceeding, involving the taxable years 1936, 1937, and 1938, is the taxpayer estopped from consideration by a proceeding previously had involving the taxable year 1934, where a new statute has been enacted covering the later years and when there has been a supervening decision of the Circuit Court settling a point of law contrary to the judgment relied upon as *res judicata* and has thus created a "new situation," rendering it inappropriate to apply the doctrine of collateral estoppel by judgment.

**Statutes and Regulations Involved.**

The Revenue Act of 1936, applicable to the taxable years 1936 and 1937 and the Revenue Act of 1938, applicable to taxable year 1938, provides for the exclusion of amounts received as an annuity as follows:

REVENUE ACT OF 1936 (49 STAT. 1648):

Section 22(b)(2). "*Annuities, etc.* Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. *Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity* (whether or not paid during such year), until the aggregate amount excluded from gross income under this title prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) of this paragraph." (Italics added.)

REVENUE ACT 1938 (52 STAT. 447):

Section 22(b)(2). "*Annuities, etc.* Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. *Amounts received as an an-*

*nuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity* (whether or not paid during such year), until the aggregate amount excluded from gross income under this title prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph." (Italics added.)

Regulation 94, relating to income tax under the Revenue Act of 1936, promulgated by the United States Treasury Department provides as follows:

Article 22 (b) (2) —2. "*Annuities.* Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. If an annuity is payable in annual installments, there shall be included in gross income only such portion of the amounts received in any taxable year as is equal to 3 per cent of the aggregate premiums or consideration paid for such annuity, whether or not paid during such year. If an annuity is payable in two or more installments over each 12-month period, such portion of each installment shall be taxable as is equal to 3 per cent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the tax-

able year, divided by the number of installments payable during such year. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income * * *."

Regulations 101, relating to income tax under the Revenue Act of 1938, promulgated by the United States Treasury Department provides as follows:

Article 22 (b) (2)—2. "*Annuities.* Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. Such portion of each installment payment of an annuity shall be included in gross income as is not in excess of 3 per cent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by 12 and multiplied by the number of months in respect of which the installment is paid. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income * * *."

**Statement.**

This case involves income tax deficiencies for the calendar years 1936, 1937 and 1938 of $671.48, $2,415.28, and $1,572.36, respectively (R. 29), resulting from the inclusion in taxpayer's income for each taxable year by the Commissioner of Internal Revenue (R. 5-15) of the entire amount

of a $15,000 payment made under the terms of a contract dated May 15, 1929 (R. 71), upon the theory that the taxpayer acquired an annuity from F. A. Gillespie and Sons Company under the terms of the said contract. The cost of this annuity was claimed to be not less than $732,120.11 and the exclusion of all but 3% of the cost permitted under the Revenue Acts being more than the $15,000.00 received each year, the taxpayer became liable for taxation upon the entire amount received. The taxpayer contended that he should be taxed upon an amount no greater than 3% of what an annuity would have cost him on May 15, 1929, that would have paid him $15,000 per year, for life. The Tax Court and the Circuit Court of Appeals of the Tenth Circuit sustained the Commissioner of Internal Revenue upon the theory that this issue was decided adversely to the taxpayer for the prior taxable year 1934, notwithstanding that a supervening decision of the Circuit Court of Appeals for the Ninth Circuit had decided the issue adversely to the contention of the Commissioner of Internal Revenue.[1]

On April 24, 1920, F. A. Gillespie and Sons Company, a corporation, was organized under the laws of the State of Oklahoma, with capital stock of $1,000,000.00, divided into 10,000 shares of $100 each. The stock of this corporation was held, five shares each in the name of F. A. Gillespie and Maud A. Gillespie, and the three sons of F. A. Gillespie and Maud A. Gillespie, being B. A. Gillespie, L. A. Gillespie and P. A. Gillespie. The remaining 9,975 shares were held in trust by F. A. Gillespie under a trust agreement dated February 9, 1921 (R. 65).

On May 15, 1929, F. A. Gillespie and Maud Gillespie entered into a separation agreement and property settlement (R. 75) and contemporaneously therewith, entered into an agreement with F. A. Gillespie and Sons Company

1. Gillespie v. Commissioner of Internal Revenue, 128 F. (2d) 140.

(R. 71). By the terms of this agreement, F. A. Gillespie and Maud Gillespie agreed to convey to the corporation all of the real and personal property owned by each, with the exception of some personal real estate and $100,000 in cash reserved by each; and in part consideration for the conveyance of this property, the corporation agreed to pay F. A. Gillespie the sum of $15,000 per year, and to Maud A. Gillespie the sum of $15,000; and, in addition, the corporation agreed that Maud A. Gillespie should receive dividends in the amount of at least $10,000 per year, and if funds were not available to be declared as dividends, the corporation agreed to pay Maud A. Gillespie from any source the said additional sum of $10,000.

Thereafter, the terms of the agreement were carried out; and between the years 1929 and 1932, conveyances were executed and delivered carrying out the terms of the agreement (R. 59).

Under the terms of the agreement, F. A. Gillespie and Maud A. Gillespie conveyed to the company the following property of the values indicated which they owned jointly:

| | |
|---|---|
| United States First Liberty Loan Bonds and Port of New Orleans, La., State Bonds | $1,172,000.00 |
| Empress Building, Tulsa, Oklahoma | 150,000.00 |
| Sundry land and lots located in Oklahoma | 22,512.00 |
| Cash and Accounts Receivable | 94,365.22 |
| Sundry stocks | 25,363.00 |
| Total | $1,464,240.22 |

The cost of the above properties to F. A. Gillespie and Maud A. Gillespie equaled or exceeded the above fair market values (R. 24-43). F. A. Gillespie was the owner of one-half of the above properties delivered to the company under the contract of May 15, 1929, and one-half of the cost of same was his (R. 60-62).

Up to December 31, 1935, F. A. Gillespie had received the sum of $99,375 under the terms of the contract of May 15, 1929. During each of the calendar years 1936, 1937 and 1938, F. A. Gillespie received from F. A. Gillespie and Sons Company the sum of $15,000 under the terms of the contract (R. 60).

Up to December 31, 1935, Maud A. Gillespie received the sum of $97,560.26 under the terms of the contract of May 15, 1929. During the calendar year 1936 Maud A. Gillespie received the sum of $19,000 and during each of the calendar years 1937 and 1938 she received $15,000 (R. 48).

On July 12, 1937, the petitioner filed a petition with the United States Board of Tax Appeals, Docket No. 89442 (R. 83). In said petition the petitioner contested the determination of the Commissioner of Internal Revenue for the taxable year 1934 that he was taxable upon the basis of $40,000 per year ($15,000 per year paid to him under the terms of the agreement and $25,000 guaranteed to be paid to Mrs. Gillespie, R. 87). Said determination of the Commissioner of Internal Revenue was made on the theory that the agreement of May 15, 1929, was a part of the divorce decree; hence the terms of the property settlement constituted alimony and the entire $40,000 was taxable to F. A. Gillespie.

Thereafter the case was tried to the United States Board of Tax Appeals and on September 30, 1938, the findings and opinion of said Board of Tax Appeals was promulgated (R. 95).[2] In the opinion and findings of fact it was determined that the amount received pursuant to the contract of May 15, 1929, by Maud Gillespie during the year 1934 was not to be included in the income of F. A. Gillespie (R. 102). Pursuant to such findings of fact and opinion the court entered its decision on October 28, 1938 (R. 102).

2. The published opinion appears as F. A. Gillespie v. Commissioner, 38 B. T. A. 673.

Thereafter, on March 2, 1939, the Commissioner of Internal Revenue proposed to assess additional income tax against Maud Gillespie for the year 1935 upon the basis that the entire amount received by her during that year under the contract of May 15, 1929, were taxable.

Thereafter, Maud Gillespie contested the Commissioner's determination by lodging an appeal with the United States Board of Tax Appeals and by it decided on the 22nd day of January, 1941, opinion reported at 43 B. T. A. 399.[3]

Thereafter the taxpayer perfected an appeal to the United States Circuit Court for the Ninth Circuit and thereafter that court determined[4] that the taxpayer should have been deemed to have paid for an annuity which the contract of May 15, 1929, granted her, based upon what such an annuity would have cost if purchased from an insurance company on that date; and that on such date Maud Gillespie could have purchased an annuity from an insurance company which would pay her the sum of $15,000 per year, for $196,537.50; the court further held that she should be taxed upon the basis of 3% of such sum, or $5,896.13; and that no more than that amount should be included in her gross income for the taxable year 1935.

Thereafter, on September 28, 1939, the Commissioner of Internal Revenue sent a registered letter directed to F. A. Gillespie in which it was proposed to assert a deficiency of income tax for the taxable year 1936 in the amount of $671.48 (R. 5). On December 13, 1939, the Commissioner sent a registered letter directed to F. A. Gillespie in which it was proposed to assert a deficiency of income tax for the year 1937 in the amount of $2,415.28 and for the year 1938 in the amount of $1,572.36 (R. 15).

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3. The Commissioner of Internal Revenue acquiesced in the decision by the Board of Tax Appeals, 1941-1 C. B. 5.

4. Maud Gillespie v. Commissioner of Internal Revenue, 128 F. (2d) 140, at pages 143-144, decided May 11, 1942.

In the determination of these deficiencies the Commissioner of Internal Revenue claimed the sum of $15,000 paid under the terms of the contract of May 15, 1929, for each of said years to F. A. Gillespie was an annuity payment, the whole of which was taxable under the provisions of Section 22 (b)(2) of the Revenue Acts of 1936 and 1938.

Thereafter, F. A. Gillespie filed petitions with the United States Board of Tax Appeals (now The Tax Court of the United States) appealing from such determinations by the Commissioner of Internal Revenue (R. 1-11).

Thereafter on May 1, 1944, the cases came on for hearing on their merits before Honorable Bolon B. Turner at which time the deposition of F. A. Gillespie was received and oral testimony and documentary testimony submitted on behalf of the taxpayer.

Judge Bolon B. Turner rendered his memorandum opinion October 25, 1944, and the decision was ordered and decided on October 25, 1944 (R. 23-29).

In the memorandum opinion by Judge Bolon B. Turner it was concluded that the petitioner was estopped from consideration of the tax cases for the taxable years 1936, 1937 and 1938, by the judgment in the prior proceeding had for the taxable year 1934. The Tax Court did not pass upon the other issues raised by the petitioner.

Thereafter on January 15, 1945, the petitioner filed a petition to review the decision of The Tax Court of the United States with the United States Circuit Court of Appeals for the Tenth Circuit (R. 32) and thereafter on October 29, 1945, the United States Circuit Court of Appeals for the Tenth Circuit affirmed the decision of The Tax Court of the United States (R. 141).

Thereafter, on the 23rd day of November, 1945, an order was entered giving the petitioner until December 8, 1945, in which to file its petition for rehearing (R. 147).

Thereafter, on the 7th day of December, 1945, the petitioner filed its petition for rehearing (R. 148) which was denied by the United States Circuit Court of Appeals for the Tenth Circuit on January 2, 1946 (R. 162).

**Specification of Errors to Be Urged.**

The United States Circuit Court for the Tenth Circuit erred:

I.

In affirming the decision of The Tax Court of the United States in finding that the proceedings had in the case of this taxpayer involving the taxable year 1934 was *res judicata* of the proceedings for the taxable years 1936, 1937 and 1938.

II.

In not sustaining the objection of petitioner's counsel to the introduction of the 1934 tax case file of the Board of Tax Appeals; and in not ordering said file excluded from the evidence in this case.

**Reasons for Granting the Writ.**

*1.* The decision of the court below is in conflict with *Henrickson* v. *Seward,* 135 F. (2d) 986, decided by the Circuit Court of Appeals for the Ninth Circuit and *Monteith Bros. Co.* v. *United States,* 142 F. (2d) 139, decided by the Circuit Court for the Seventh Circuit and *Pelham Hall Co.* v. *Hassett,* 147 F. (2d) 163, decided by the Circuit Court of the First Circuit and *Commissioner of Internal Revenue* v. *Arundel-Brooks Concrete Corporation,* 152 F. (2d) 225, decided by the Circuit Court of the Fourth Circuit and *Commissioner of Internal Revenue* v. *Security-First National Bank of Los Angeles,* 148 F. (2d) 937, decided by the Circuit Court of the Ninth Circuit and *Commissioner of In-*

*ternal Revenue* v. *Netcher,* 143 F. (2d) 984, decided by the Circuit Court for the Seventh Circuit, and *Blair* v. *Commissioner of Internal Revenue,* 300 U. S. 5, .... S. Ct. 332, 81 L. ed. 465.

All of these decisions hold that a supervening decision of the highest court[5] settling a point of law contrary to the judgment relied upon as *res judicata* may be considered as having created a "new situation" rendering it inappropriate to apply the doctrine of collateral estoppel by judgment in litigation involving subsequent tax years.

There is no legal distinction between those holdings and the one for which the petitioner asks in this case, to-wit, that the decision by the Board of Tax Appeals in the 1934 case deciding that F. A. Gillespie was taxable only upon the $15,000 received by him, was not *res judicata* of the issue that he was taxable upon the basis of 3% of the cost of an annuity which would produce the sum of $15,000 per annum, which was the issue in the 1936, 1937 and 1938 cases, particularly where there had been an intervening decision by the highest court settling a point of law contrary to the 1934 judgment which was relied upon as *res judicata;* thus rendering it inappropriate to apply the doctrine of collateral estoppel by judgment in litigation involving subsequent tax years.

In refusing to consider the merits of the case of petitioner for the subsequent tax years of 1936-1938 the decision of the court below is in conflict with *Gillespie* v. *Commissioner of Internal Revenue,* decided by the Circuit Court of Appeals for the Ninth Circuit, 128 F. (2d) 140,[6] in which the court stated:

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5. The highest court was considered to be the Circuit Court of Appeals in the Henrickson and Monteith Bros. Co. cases.

6. The court quoted with approval Raymond v. Commissioner of Internal Revenue, (C. C. A. 7th Cir.) 114 F. (2d) 140, certiorari denied 311 U. S. 710, 85 L. ed. 462, 61 S. Ct. 319; in which the court held that

"Petitioner (the taxpayer's executor) contends that the contract was not an annuity contract, but was merely a contract whereby the taxpayer and her husband transferred property to the corporation. Actually, it was a contract whereby the taxpayer and her husband transferred property to the corporation, and in consideration thereof, the corporation agreed (1) to pay each of them $15,000 a year for life and (2) to pay the taxpayer a dividend of $10,000 a year. We think that, in so far as it related to the payments of $15,000 each to the taxpayer and her husband, this was an annuity contract."

2. The decision of the court below is in conflict with *Dow* v. *Humbert,* 91 U. S. 294, 23 L. ed. 368, and *Bank of United States* v. *Beverly,* 42 U. S. 134, 11 L. ed. 75. Those decisions hold that where a plea of *res judicata* is made in the answer it must allege a prior final judgment with certainty and that a general allegation is not sufficient to warrant the admission of evidence of the judgment.

There is no legal distinction between that holding and the one for which the petitioner contends in this case, to-wit, that the plea of *res judicata* set out in the answer of the respondent supported only by the statement that a *former case had been decided between the same parties,* the opinion of which was alleged to be reported at 38 B. T. A. No. 91 was not sufficient to warrant the admission of evidence of the "judgment" or "decision" in the case of *F. A. Gillespie* v. *Commissioner of Internal Revenue,* Docket No. 89442.

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6. (*continued*)

where an annuitant purchased an annuity paying therefor more than the "fair cost" of acquiring a similar annuity from an insurance company that the legal presumption was that the excess over such "insurance company cost" was a gift and the amount to be taken into consideration in computing taxpayer's income tax was only such "fair cost" and not the total value of the gift.

*3.* The court below has in this case decided an important question of Federal law which is in conflict with the Circuit Court for the First, Fourth, Seventh and Ninth Circuits and in view of the importance of the question of *res judicata* and its application to tax cases the question continues to be an active one and should be authoritatively settled by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

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